



March 21, 2001

Ms. Katherine Martinez-Vitela
Vega & Vitela, L.L.P.
Financial Center Northwest
6243 IH 10 West, Suite 720
San Antonio, Texas 78201

OR2001-1114

Dear Ms. Martinez-Vitela:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145192.

The Eagle Pass Independent School District (the "district"), which you represent, received a request for copies of "the Special Counsel's Investigation Report and the Texas Education Agency's Investigation Report" regarding the district's textbook purchasing procedures. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.116 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

We first address the special counsel's investigative report, which is subject to required public disclosure under section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, *the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1) (emphasis added). You inform this office that "the Investigative Report by Special Counsel was completed and provided to the Board of Trustees on December 26, 2000." Thus, as it is a completed report, the district must release the special counsel's report under section 552.022(a)(1) unless the report is excepted from disclosure

under section 552.108 or expressly confidential under other law. Sections 552.103 and 552.107 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and are therefore not other law that makes information expressly confidential for purposes of section 552.022(a). See Gov't Code § 552.007(a); *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107).

You assert that the special counsel's report is confidential under Rule 503 of the Texas Rules of Evidence. The Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022" of the Government Code. See *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the report is confidential under Rule 503. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). Under Rule 503, a communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must (1) show that the document is a communication that was transmitted between privileged parties or that reveals a confidential communication; (2)

identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, a document containing privileged information is confidential under Rule 503, provided that the client has not waived the privilege and that the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). See *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You inform this office that the special counsel's report "was made for the purpose of facilitating the rendition of professional legal services to the [district]." You explain that the firm that ordinarily serves as the district's general counsel recused itself and that your firm prepared the report as the district's investigator and legal representative. Based on these representations and our review of the requested report, we conclude that it is excepted from disclosure under Texas Rule of Evidence 503.

We next address the report prepared by the Texas Education Agency (the "TEA"), which the district seeks to withhold under sections 552.103 and 552.116 of the Government Code. Section 552.116 provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You explain that the district requested that TEA conduct an investigation after learning that one of the subjects of the district's investigation was represented by counsel. You point out that "the Managing Director of School Finance for TEA expressly states that [the TEA report] is a preliminary report." You inform us that "[t]o

date, the report has not been finalized.” Based on your representations and our review of the TEA report, we conclude that it is excepted from disclosure as an audit working paper under section 552.116. *See* Gov’t Code § 552.116(b)(1); *see also* Open Records Decision No. 580 (1990) (expanding scope of audit working papers under statutory predecessor). As we are able to make this determination, we need not consider whether the report is excepted from disclosure under section 552.103.

In summary, the special counsel’s investigative report is excepted from disclosure under Texas Rule of Evidence 503. The TEA preliminary report is excepted from disclosure under section 552.116 of the Government Code. Thus, the district may withhold both reports from the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

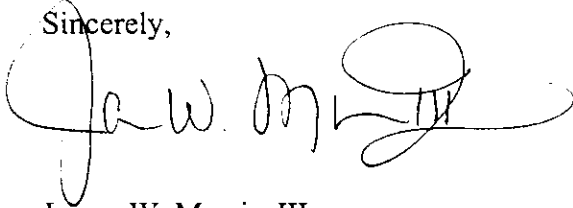
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is fluid and cursive, with a large loop at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/er

Ref: ID# 145192

Encl: Submitted documents

cc: Mr. James D. Lehmann
c/o Katherine Martinez-Vitela
Vega & Vitela, L.L.P.
Financial Center Northwest
6243 IH 10 West, Suite 720
San Antonio, Texas 78201
(w/o enclosures)